Supreme Court, U. S.
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in the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-47

ELAINE M. ORR,

Petitioner,

v.

FRANK R. MacNEILL & SON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ROBERT W. HERVEY, ESQUIRE and
RICHARD H. W. MALOY &
ASSOCIATES, P.A.
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MIAMI REVIEW — 371-4853 — 377-3721

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

ELAINE M. ORR, the Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered in the above-entitled case on April 10, 1975.

CITATIONS TO OPINIONS BELOW

The District Court's decision has not been published. The decision of the United States Court of Appeals, Fifth Circuit, has been published in 511 F.2d 166.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. §1254; 42 U.S.C. §2000e, et seq.; 42 U.S.C. 2000e-2, et seq.; 29 U.S.C. 206(d)(1); 29 U.S.C. 206(d)(l)(iv), as well as Rules 19, 20, 22 and 23 of the Rules of the Supreme Court of the United States. Certiorari is sought to review the judgment of the United States Court of Appeals, Fifth Circuit, which said judgment was entered April 10, 1975.

QUESTIONS PRESENTED

Whether the United States Court of Appeals exceeded its authority in reversing the District Court, sitting as the trier of fact, which found that Petitioner proved that she performed work substantially equal to male employees but that the Respondent was guilty of sex discrimination against her.

STATUTES INVOLVED

42 U.S.C. §2000e, et seq.

42 U.S.C. §2000e-2, et seq.

29 U.S.C. §206(d)(l)

29 U.S.C. §206(d)(l)(iv)

STATEMENT OF THE CASE

The Petitioner, who was the Plaintiff in the trial court, the U.S. District Court for the Southern District of Florida, filed a complaint for violation of her civil rights against the Respondent, Frank R. MacNeill & Sons, Inc., seeking damages in excess of Ten Thousand and no/100 ($10,000.00) Dollars, attorney's fees, costs and other such relief that the court would deem proper. The trial judge, sitting without a jury on June 11, 1973, entered his findings of fact and conclusions of law finding that the Respondent violated the applicable statutes because it discriminated against Petitioner on the basis of her sex. (App. #12). On June 28, 1973, the trial judge entered a judgment in favor of Petitioner-Plaintiff against the Respondent-Defendant, in the sum of $12,480.00 as damages and ordered in that judgment that her attorney's fees and costs shall be taxed against the Respondent-Defendant. (App. #20). The Respondent-Defendant appealed the final judgment and the United States Court of Appeals, Fifth Circuit, on April 10, 1975, reversed the District Court.

This is a classic case where there was conflicting testimony on the critical issue of whether the Respondent discriminated against the Petitioner, a woman, by denying her equivalent salary to that paid male employees, although she performed equal work for the Respondent, Frank R. MacNeill, Inc.

The Petitioner testified that in February, 1963, she became manager of the accounting department and vice president of Frank R. MacNeill, Inc.; that as part of her duties, she had charge of receiving and disbursing money,

signed all the checks for all the corporations involved in the business, did all the purchasing for the company, handled the maintenance of the building and the maintenance and repairs of the equipment; that at the time there was a casualty department, fire department, supply department, accounting department and a separate corporation known as Insurance Servicing and Adjusting, which was referred to as the claims department. That in addition to the Petitioner's other duties, she was in charge of the supply department, although not referred to as a manager. Mr. John F. Bruns was head of the fire department and vice president of Frank R. MacNeill & Son, Inc.; Thomas B. Rogan manager of the claims department, who was made president of Insurance Servicing and Adjusting when that corporation was formed; and James Moore was manager of the casualty department. Petitioner worked closely with Mr. Rogan and helped and discussed and assisted him in the general agency operations that would affect the claims department. That she assisted Mr. Moore in his department, both as to matters regarding accounting and when his department required additional assistance pertaining to matters in the casualty department. The petitioner also assisted Mr. Bruns, who was manager of the fire department, in that she helped instruct his employees and helped to instruct him when he first came to the company, as well as when he became manager of the department. The Petitioner also contacted various agents of the company and assisted them with their accounting problems and with their problems in regards to the payment of premiums which they may have with the insurance companies which they represented. This service was performed by the Petitioner in the office and occasionally she was required to visit the agents in person. In addition the Petitioner testified that she averaged approxi-

mately 50 hours a week, and that this was required for her to keep her department up to date as much as possible. That during the time that she was the manager, she was responsible to Frank MacNeill, who at that time was president of the corporation.

In order to determine that the Petitioner performed equal work, it is necessary to ascertain the duties of the other managers of the corporation. The Petitioner testified that Mr. Rogan became manager of the Insurance Servicing and Adjusting company, which was part of the claims department of Frank R. MacNeill & Son, Inc., in 1967, and that his duties were to supervise and train adjusters, the review of claims, generally instruct people under him in the handling of the company's claims, and to issue loss drafts. This statement was corroborated by Mr. Rogan when he was called as an adverse witness by the Petitioner, and his testimony reflects that the only addition to the Plaintiff's testimony was that Mr. Rogan also hired and fired the personnel in his department. Mr. Rogan testified that he did have occasion to contact the Petitioner in regards to accounting matters for his department, and that as to any major purchase, that was under the cognizance or supervision of the Petitioner, Mrs. Orr. Mr. Rogan stated that the function of the accounting department, which was under the management of the Petitioner, and the claims department, which was under his management, were equal in importance to the overall operation of the agency.

The Petitioner testified that James Moore was manager of the casualty department and that his duty was to underwrite the casualty business which would be accept-

able to the insurance company; that Mr. Moore would review the various applications for insurance policies in order to underwrite the business.

In the case of *Schultz v. American Can Company*, 424 F.2d 356 (1970), the Court stated

> "Congress, in using the terms 'equal work' and 'equal effort' in the Equal Pay Act, did not intend jobs to be identical to be equal, but intended only that they require the same effort, skill and responsibility."

The controlling factor under the Equal Pay Act is job content; that is, the actual duties that the respective employees are called upon to perform. *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (1970).

The case of *Hodgson v. Robert Hall Clothes, Inc.*, 326 F.Supp. 1264 (1971), directs itself to the issues before the Court in the instant case. That case was concerned with the differential in pay between salesmen and salesladies employed by the Defendant, Robert Hall Clothes. The Defendant argued that the job of selling in the men's department differs substantially from that in the women's department because of difference in the character, price, profitability, markup and markdown in the merchandise sold. Defendants further argued the job content of salesmen and saleswomen differs with respect to the type of training received; the work required of men in completing the back of cash alterations sales slips, their alteration and fitting responsibilities, and the use of sizing charts and tape measures in connection with fittings. That generally speaking, the prices, profitability and markups were higher in men's wear than in women's wear, and the markdown differences were less in the case of men's wear than in women's wear. The Court found, however, that these variances were not so great as to make any significant differences in the effort, skill and responsibility required between salesmen and salesladies in performing their jobs. The testimony which the defense presented in the *Hodgson v. Robert Hall Clothes, Inc.* case is basically the same as used by the Respondent in this case, to wit: that economic considerations were the sole reasons for the compensation differential and that sex had nothing to do with it. However, the Court in *Hodgson v. Robert Hall Clothes, Inc.* found that although the jobs were different, they were not unequal within the meaning of the Equal Pay Act. In fact, it must be pointed out that the District Court Judge hearing this matter noted in his opinion that until 1967, the petitioner was the highest paid of the four department heads (App. #17). Shortly after 1967, the then president of Frank R. McNeill & Son, Inc., Mr. Frank R. McNeill, due to illness was forced to work a reduced scheduled (App. #37) and delegated more of his corporate duties to his son, whom it was testified about would *never* pay a woman compensation equal to that he paid a man (App. #36) even for the identical work. With the reduction of responsibilities on the part of the elder Mr. McNeill, there is a direct corrolation to the diminishing salary of the petitioner in relation to that of the other department heads as reflected by Judge Roettger's decision (App. #15). Therefore, it is submitted that the Trial Court could and did find, upon the basis of the testimony presented, that the Petitioner's job requirements as manager of the Accounting Department, vice president of the Respondent corporation, licensed insurance agent, authority to sign and disburse funds, the maintenance of the premises, and

the purchase of the equipment and supplies for the business were equal insofar as the skills and responsibilities and efforts were concerned, when compared to the effort, skills and responsibility of the other managers of the Defendant corporation. This equality was recognized by the employer when, for a period of two years prior to the commencement of Respondent's course of discrimination Petitioner received equal compensation with the highest paid manager.

The United States Court of Appeals, Fifth Circuit, reversed the District Court's judgment and in doing so it violated the well-known and well-followed principle of appellate law that a court of review will not essay an independent evaluation of evidence since this is the function of the trial court. See Graver Tank & Mfg. Co. v. Linde Air Products Co. 339 US 605, 94 L.Ed. 1097, 70 S.Ct. 854, reh. den .340 US 845, 95 L.Ed. 620, 71 S.Ct. 12.

Examples of the United States Court of Appeals' usurping the trial court's functions of weighing the evidence are the following:

1. The United States Court of Appeals found that Malcolm MacNeill was the operating head of the Respondent corporation and that he had charge of fixing salaries, whereas the trial court found there was conflicting attitudes on the part of the principal officers.

2. The Appellate Court found that the duties of other managers require an exercise of discretion and sets forth in detail their duties. The Appellate Court ignored, however, the importance of the positions held by the Petitioner, including being a licensed insurance agent.

3. The District Court believed the testimony of the Petitioner with regard to her conversations with Frank R. MacNeill concerning her not receiving equal pay. The Circuit Court chose to discredit that testimony.

4. The Court of Appeals in rejecting the District Court's conclusion that the fact that the Petitioner's successor was receiving equal salary to her though less experienced, was evidence of lack of discrimination and made a finding of fact, not in the record, that the successor's work was done as well as was the Petitioners.

5. The Appellate Court chose to use the fact that at one time no discrimination existed as evidence that no discrimination existed at the time complained of in the Plaintiff's complaint. Such procedure on the part of the Appellate Court is improper in the absence of a finding that the trial court's findings of fact are erroneous.

6. The Appellate Court apparently completely overlooked the District Court's analysis of the instant case as not being a typical production line case; that this case involved management positions which were not completely identical to one another. This is not the typical production line, retail clerk or bank teller situation where the job requirements can be calibrated in minute detail.

7. The Appellate Court overlooks the testimony given by Messrs. Bruns and Rogan as to the assistance given their department by the Petitioner in detailing her job responsibilities. The Appellate Court offers no reason for ignoring this finding on the part of the trial court and this finding was one of the findings upon which the judgment of the trial court was entered.

The United States Court of Appeals, Fifth Circuit, in their decision, which the Petitioner seeks to have reversed in this Court, has interpreted the statutes involved as requiring that before violation can be shown the positions held by the male and female employee must be mirror images of each other. Such was not the intention of Congress in enacting these statutes. Congress certainly intended to include within the purview of the statutes, management personnel — no two management positions will hardly ever be identical.

As to Mr. Bruns, who was manager of the fire department, the Petitioner testified that his duties consisted of handling the underwriting for the fire department and approved and disapproved risks which might be acceptable to the general agency and to the companies they represented. Further, Mr. Bruns contacted agents, visited the various companies and prospective companies to get additional facilities for the general agency. In essence, he was in a production capacity. This testimony was corroborated by Mr. Bruns when the Petitioner called him as a witness, and he stated that he learned the business by sitting at the underwriting desk to learn the various commission schedules and underwriting philosophies of the company. Mr. Bruns also stated that he sought the Petitioner's advice pertaining to the normal operations and office procedures and technical things with which he was unfamiliar since he had been in the field but not in the office. Some of these procedures included underwriting, coding, bookkeeping, accounting and any other problem with which he was unfamiliar. Mr. Bruns testified that Mrs. Orr was conversant with the operation of his department and that he sought her advice. Mr. Bruns was also able to state that he was familiar with the duties

which were performed by the Petitioner, Elaine M. Orr. He stated that she was not always in the accounting department, that she had had various duties in the company; that she had performed whenever the need arose and would attempt to do a job for the MacNeills. Mr. Bruns also stated that the importance of the accounting department was equal to that of the fire department. On cross examination, Mr. Bruns stated, "Mrs. Orr was thoroughly familiar with all of the aspects of my department, and therefore I consulted in her and received advice as to the best way to properly handle it as far as an office manager, because I had never been a manager, so to speak, before."

The comparative salaries of the four department heads was admitted into evidence and were set forth in the trial court's Findings of Fact and Conclusions of Law, and these are correct, except for the year 1967, when the Petitioner received $12,012, Mr. Bruns received $15,002.00, and Mr. Rogan received $14,001.00. It is the differentiation of salary increases commencing in the year 1967, that brought the controversy into full focus when the Petitioner filed her Complaint. At the time when the Petitioner's 1967 salary was less than Mr. Bruns, she did complain to Frank R. MacNeill, who stated to her "Well, my son would not approve you making as much as the men". Mr. MacNeill requested that she give him time and he would try to come up with a solution. Apparently the salaries were not increased in 1968, so that it was 1969 when another raise became apparent and a differentiation was still apparent, at which time the Petitioner complained to Frank MacNeill in January, 1969, about the increases. At this time, the Petitioner said to Mr. MacNeill that she did not understand why there was a differentiation in salary, inasmuch as the managers were working in the

same capacity and that the jobs were equally important, also that the Petitioner knew as much or more about the general operation of the agency than anybody in the company. In reply, Mr. Frank MacNeill said that his son, Mr. Malcolm MacNeill, would not pay a woman as much as a man, but he (meaning Frank MacNeill) would try to work it out. This performance was repeated in January 1970, and Frank MacNeill still requested more time to work things out, promising that there would be other options available to the managers. Mr. Frank MacNeill, in answer to various inquiries made by the Petitioner, continued to stall her by telling her that he needed more time and that something would be worked out. During the time the Petitioner was making these inquiries and conferring with Mr. Frank MacNeill, Mr. MacNeill acknowledged that money was due Petitioner, and that it would be easier to replace any of the men managers than it would to replace the Petitioner.

The Equal Pay Act [29 U.S.C. 206(d)] was enacted in 1963, one year before the passing of the 1964 Civil Rights Act (Title VII (42 U.S.C. 2000e-2). Although the Civil Rights Act also applies to sex-based wage discrimination, it does not replace the earlier Act. In many respects, the goal of eliminating sex-based wage discrimination is central to both the Equal Pay Act and the Civil Rights Act sex discrimination provisions.

While the scope of the Civil Rights Act is in one sense much broader than the Equal Pay Act, dealing as it does with equal employment opportunity as well as wage discrimination, much of its thrust with respect to employment opportunity also affects the question of wage discrimination. In fact, §2000e-2h of the Civil Rights Act provides in

part that it is not an unlawful employment practice under Title VII of the Civil Rights Act for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of the Fair Labor Standards Act of 1938 as amended and set forth in 29 U.S.C. 206(d). Therefore, it would follow that 42 U.S.C. 2000e-2 does not incorporate the "equal work" requirement of 29 U.S.C. 206(d) in that we are dealing with two separate and distinct statutes, even though one makes reference to the provisions of the other whereby wages or compensation which may be paid to employees may be paid on the basis of a differentiation if falling within those exceptions which are common to both statutes.

The action before the Court was brought pursuant to the 1964 Civil Rights Act, 42 U.S.C. §2000(e), et seq. Said Act refers to a pay differential if authorized by the Equal Pay Act of 1963, §206(d)(1), in accordance with the following exceptions:

a) A Seniority system,

b) A merit system,

c) A system which measures earnings by quantity or quality of production, or

d) A differential based on any other factor other than sex.

In the case of *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (1970), the Court, in referring to the Equal Pay Act,

stated that the Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it. The Court went on to say that the Civil Rights Act is much broader than the Equal Pay Act, and its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act.

Respondent has attempted to place itself within the requirements of the Equal Pay Act by asserting that the other managers' jobs were more important to Respondent corporation, and that the other managers produce revenue while the Plaintiff did not. These defenses fail as not being within the exceptions of the Equal Pay Act, and further fail as the Court held in *Schultz v. Corning Glass Works*, 319 F.Supp. 1161 (1970) that the four exceptions to the Act are affirmative defenses which must be pleaded and proved by a Defendant employer. No such defenses were pleaded in the case before the Court.

In *Schultz v. Wheaton Glass Company*, supra, an action was brought under the Equal Pay Act. This case made reference to the Civil Rights Act and stated although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act. The Court further stated that since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which, by virtue of §206(d), would undermine the Civil Rights Act. The Court found in this case that the

Plaintiff had clearly established a prima facia case that the wage differential was based on sex and therefore the burden of proof fell on the Defendant to prove its claim that it came within the exceptions as contained in §206(d) of the Equal Pay Act.

The case of *Wirtz v. Basic, Inc.*, 256 F.Supp. 786 (1966), which was also brought under the Equal Pay Act, stated that in applying the law it establishes an objective standard requiring that a judgment be based upon the requirement of particular jobs being compared rather than skill, effort or training and previous experience. Therefore, it would seem to follow that jobs which were equally important to the welfare of the employer in the operation of the business would be designated as equal and come within the provisions of the law as determined by the case histories.

The case of *Ammons v. Zia Company*, 448 Fed.2d 117 (1971), was an action brought under the Civil Rights Act prohibiting discrimination in employment classifications and compensation based on sex. The Court stated that one who asserts violation of the statute has the burden of proving that the wage differential is based on sex discrimination; but if a prima facia case of discrimination is established, the burden falls upon the Defendant to prove that the differentiation is based on any factor other than sex.

CONCLUSION

The ruling of the United States Court of Appeals for the Fifth Circuit is contrary to the Equal Pay Law and The Equal Employment Opportunities Act. This Court should issue its Writ of Certiorari to reverse the ruling of the United States Court of Appeals for the Fifth Circuit and reinstate the judgment of the United States District Court for the Southern District of Florida.

Respectfully submitted this 9th day of July, 1975.

ROBERT W. HERVEY,
ESQUIRE and
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By: Richard H. W. Maloy
RICHARD H. W. MALOY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari was mailed to: FRATES FLOYD PEARSON STEWART PROENZA & RICHMAN, P.A., Attorneys for Respondent, Twelfth Floor Concord Building, Miami, Florida 33130, this 9th day of July, 1975.

Richard H. W. Maloy
RICHARD H. W. MALOY